

CAN MARRIAGE SURVIVE SECULARIZATION?

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In many countries, including the United States and Australia, the law of marriage has now been divorced from its Judeo-Christian heritage and given a secular meaning. Can marriage itself survive this process of secularization? The Article explores the drift away from marriage as the basis for family formation and child-rearing in Europe, North America, and South America, and the weakening of the marriage contract in law. It goes on to examine the laws concerning the solemnization of marriage and the differences (if any) between marriage and other family forms in a number of jurisdictions. These laws are explored by evaluating the options for family formation that are available to a young couple in Amsterdam, London, Edinburgh, Melbourne, and Washington, D.C.

The conclusion is that the law governing the entry into (and exit from) marriage is losing much of its coherence and purpose. While marriage will continue to be important to people of faith and in certain cultures, civil marriage will gradually become little more than a means of registration of intimate partnerships. This will occur because the secular State lacks any convincing narrative about what marriage is, and any justification for having a marriage celebrant who represents the authority of the State.

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I. INTRODUCTION

In the United States of America, as elsewhere, the relationship between religion and government continues to be hotly debated. Recent decisions of the Supreme Court of the United States have supported claims for religious freedom from State regulation;¹ on the other hand, the majority of the Supreme Court has held that there is a constitutional right for gay and lesbian couples to marry.² To the extent that the traditional view of marriage as being between a man and a woman reflects religious beliefs and values, those values no longer hold sway in the public square.

It is typical of American constitutional law, so dominated as it is by the rhetoric of individual and minority group rights, that these major decisions on the relationship of law and religion rely upon a rights discourse. In *Obergefell v. Hodges*, the Supreme Court did not seek to redefine a fundamental social institution, but rather to insist that certain kinds of dyadic relationship (that is, the intimate relationship of persons of the same gender) could not be excluded from eligibility for the status.³ In the process though, marriage law no longer reflects a Judeo-Christian understanding of the institution. *Obergefell v. Hodges* brings about a divorce of Church and State in one of the few areas where there was, until a few years ago, common ground. This could be seen as an aspect of the process of secularization in which government policy is seen to be based on “public,” “neutral,” or “secular” reasons rather than the “comprehen-

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. *Id.* at 2604–05.

sive doctrines” of particular religious and non-religious worldviews.⁴ In the modern secular State, if there is a value system or core set of beliefs, it is to be found in human rights jurisprudence rather than a shared cultural or religious heritage.

There has been a similar secularization of marriage as a matter of constitutional law in Australia, but this has occurred as a consequence of a fundamental redefinition of marriage rather than beliefs about human rights or equality before the law. In the Australian Constitution, the federal Parliament has the power to make laws concerning “marriage.”⁵ At the time the Constitution was enacted, the English common law defined marriage in terms of Christian teaching.⁶ That definition was given in a famous judgment of Sir James Wilde (who later became Lord Penzance) in the 1866 case of *Hyde v. Hyde and Woodmansee*.⁷ The case concerned the validity of a Mormon marriage.⁸ The judge held that such a marriage would not be recognized in the English common law.⁹ Marriage, he said, is “a union for life of one man and one woman to the exclusion of all others, as understood in Christendom.”¹⁰ That left no room for polygamy. It also did not allow for same-sex marriage, not that this could possibly have been in contemplation at the time.

Australia’s High Court, the ultimate court of appeal, has now held that this definition does not apply to the word “marriage” in the federal Constitution.¹¹ The issue arose because the Australian Capital Territory (“ACT”), where Canberra is located, enacted a law allowing for same-sex marriage.¹² In *Commonwealth v. Australian Capital Territory*, the High Court had to determine the question whether doing so was inconsistent with the federal Marriage Act of 1961.¹³ The High Court held, unanimously, that it was inconsistent and therefore invalid.¹⁴ It decided that because the word “marriage” in the Constitution could be interpreted to allow for same-sex marriage, the ACT’s law intruded onto a field which was exclusive to the federal Parliament.¹⁵ The Court observed that marriage had held different meanings and characteristics at different stages of history and in different cultures, and that marriage in some cultures involved polygamy.¹⁶ The Court wrote: “The status of marriage, the social institution which that status reflects, and the rights and obligations

4. JOHN RAWLS, *POLITICAL LIBERALISM* (2005). On secularism and support for same-sex marriage, see David B. Oppenheimer et al., *Religiosity and Same-Sex Marriage in the United States and Europe*, 32 *BERKELEY J. INT’L L.* 195 (2014).

5. AUSTRALIAN CONSTITUTION s 51(xxi).

6. See *Hyde v. Hyde & Woodmansee* (1866) L.R. 1 P. & D. 130, 130 (Austl.).

7. *Id.* at 133.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Commonwealth v. Austl. Cap. Terr.*, (2013) 250 CLR 441, 460–61 (Austl.).

12. *Id.* at 452.

13. *Id.*

14. *Id.*

15. *Id.* at 453–55.

16. *Id.* at 462.

which attach to that status never have been, and are not now, immutable.”¹⁷ The Court offered a new and secular definition of marriage for the purposes of constitutional law that allows both for same-sex marriage and polygamy:

Once it is accepted that “marriage” can include polygamous marriages, it becomes evident that the juristic concept of “marriage” cannot be confined to a union having the characteristics described in *Hyde v. Hyde* and other nineteenth century cases. Rather, “marriage” is to be understood in s 51(xxi) of the *Constitution* as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognizes as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.¹⁸

The decision did not introduce same-sex marriage in Australia. It only established that should the federal Parliament choose to do so, it *could* enact a law for same-sex marriage or to recognize polygamy, and that this power to legislate was exclusive to the federal Parliament.¹⁹ The secular constitution was not constrained by a Christian worldview.

This Article explores whether marriage can survive this divorce from its Judeo-Christian meaning. That is not the same as asking whether it can survive same-sex marriage. The arguments have raged backwards and forwards on whether allowing same-sex marriage will have any effect on heterosexual unions.²⁰ This Article seeks to explore a much broader question, of which the recognition of same-sex marriage is just a part—can marriage, in the form we know it, survive its conceptual separation from its religious and cultural roots? In a secularized world, will the entry into and exit from marriage continue to be regulated by law other than in terms of maintaining an evidentiary record of relationships?²¹

II. LEGAL MARRIAGE AND THE RISE OF INFORMAL COHABITATION

Around the Western world, and excepting those jurisdictions which retain a notion of “common law marriage,” the distinction between legal (*de jure*) marriage and informal cohabitation rests on four differences. First, for a legal marriage, there needs to be a celebrant who witnesses the exchange of promises and pronounces the couple to be married at the

17. *Id.* at 456.

18. *Id.* at 461.

19. *Id.* at 456.

20. See, e.g., M. V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?*, 1 SEXUALITY RES. & SOC. POL’Y 1 (2004); Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands*, 51 DEMOGRAPHY 317 (2014); Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189 (2003).

21. The merits of this have been argued elsewhere. See ERIC CLIVE, *Marriage: An Unnecessary Legal Concept?*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 71 (John M. Eekelaar & Sanford N. Katz eds., 1980). For essays debating the abolition of the status of marriage entirely, see MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed. 2006).

conclusion of that exchange. Second, there is registration of that union in the jurisdiction's official records. Third, to formally terminate that marriage, a state official—almost invariably a judge or someone acting on behalf of the court—must pronounce a divorce. Fourth, in most jurisdictions, but not all, there are differences in terms of the legal incidents of marriage as opposed to informal cohabitation.²² These may include differences in terms of the division of property on marriage breakdown, maintenance obligations, and rights *vis-à-vis* the State which are consequent upon marital status and which have not been extended to informal cohabitation.²³

A. *The Demise of Legal Marriage*

Legal marriage, which was once the only accepted context for sexual relations and the nurture of children in Western countries, has long ceased to be central to people's sexual or reproductive lives in many parts of the world.²⁴

Marriage remains the most common form of couple relationship within Western and Northern Europe, but the gap between marriage and cohabitation as a family form is narrowing. For example, figures from 2006 show that in France, twenty-six percent of adults in the eighteen to forty-nine age range were cohabiting, while thirty-nine percent were married.²⁵ In Sweden, twenty-five percent were cohabiting and thirty-seven percent were married.²⁶ In the United Kingdom, in 2001, twenty-two percent of adults aged between twenty and thirty-four were cohabiting, while thirty-two percent were married.²⁷

In the United States, marriage is increasingly stratified by reference to educational level. The percentage of adults aged twenty-five to sixty with four years of high school education but no college education, and who were in first marriages, fell from seventy-three percent in the 1970s to forty-five percent in the 2000s.²⁸ There was also a twenty-eight percent decline in first marriages among the least educated adults over this same time period. While rates of marriage have declined for people of all edu-

22. See generally, FAMILY LAW: BALANCING INTERESTS AND PURSUING PRIORITIES, (L. Wardle & C. Williams eds., 2007).

23. *Ibid*; see *infra*, Part IV.

24. Ron Lesthaeghe, *The Unfolding Story of the Second Demographic Transition*, 36 POPULATION & DEV. REV. 211, 243 (2010).

25. CHILD TRENDS, WORLD FAMILY MAP 2014: MAPPING FAMILY CHANGE AND CHILD WELL-BEING OUTCOMES 15 fig.4 (2014), available at <http://worldfamilymap.org/2014/wp-content/uploads/2014/04/WFM-2014-Final-LoResWeb.pdf>.

26. *Id.*

27. *Id.*; see also ORG. FOR ECON. CO-OPERATION & DEV., DOING BETTER FOR FAMILIES 25 fig.1.5 (2011), available at <http://www.oecd.org/els/family/47701118.pdf>.

28. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 21 fig.3 (W. Bradford Wilcox et al. eds., 2010), available at http://nationalmarriageproject.org/wp-content/uploads/2012/06/Union_11_12_10.pdf.

cational levels, the rate of decline has been least among college-educated people.²⁹

Perhaps the lowest rates of marriage are in Latin America, where “consensual unions” have long been common amongst indigenous and poor communities.³⁰ In recent years, the practice has spread among the middle and upper classes.³¹ In the Dominican Republic, Panama, Honduras, Nicaragua, Peru, Colombia, and Uruguay, the proportion of consensual unions is higher than for marriages amongst women in partnerships aged fifteen to forty-nine.³²

B. *Ex-nuptial Births*

Not only has there been a decline in marriage as the basis for an intimate domestic partnership, but it has ceased to be the dominant context for child-rearing. In 2013, nearly forty-one percent of all births in the United States were outside of marriage, with some demographic groups recording even higher rates of ex-nuptial births.³³ Figures show that 71.5% of all births to African American mothers were ex-nuptial, as were 53.2% of all births to Hispanic mothers.³⁴ In many parts of Europe also, rates of ex-nuptial births are high. Indeed, in the European Union, the share of extramarital births has been on the rise in recent years in almost every member state.³⁵ In some countries, the majority of live births are outside marriage. In 2011, for example, Estonia (59.7%), Slovenia (56.8%), Bulgaria (56.1%), France (55.8%), and Sweden (54.3%) all had a majority of births outside marriage while, in Belgium the figure was fifty percent.³⁶ The highest rate of extramarital births in Europe is in Iceland at sixty-five percent of all births.³⁷

More than half of these ex-nuptial births across Europe are in cohabiting unions, although there are significant variations between countries.³⁸ Many children are being born to single mothers outside of any cohabiting relationship. In Ireland, for example, thirty-five percent of all births are outside marriage. Of these, nearly half (forty-five percent) are to single mothers without the other parent in the home; that is nearly six-

29. *Id.*

30. Teresa Castro Martin, *Consensual Unions in Latin America: Persistence of a Dual Nuptiality System*, 33 J. COMP. FAM. STUD. 35, 36 (2002).

31. Benoît Laplante et al., *Childbearing Within Marriage and Consensual Union in Latin America, 1980–2010*, 41 POPULATION & DEV. REV. 85, 86 (2015).

32. *Id.* at 88.

33. JOYCE A. MARTIN ET AL., NAT'L VITAL STATISTICS REPORT, BIRTHS: FINAL DATA FOR 2013 2 (2015), available at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf.

34. *Id.* at 6.

35. EUROSTAT, EUROPE IN FIGURES—EUROSTAT YEARBOOK 2011: POPULATION 129 (2011), available at http://ec.europa.eu/eurostat/en/web/products-statistical-books/-/CH_02_2011.

36. Silvia Andueza Robustillo et al., *EU Employment and Social Situation*, SOCIAL EUR. (Eur. Comm'n, Luxembourg) (Mar. 2013), at 25, available at <http://ec.europa.eu/eurostat/documents/3217494/5775829/KE-BH-13-0S2-EN.PDF/e99e7095-df33-42ee-9429-626e04ddec11>.

37. EUROSTAT, *supra* note 35, at 133 tbl.2.12.

38. *See id.* at 129, 133 tbl.2.12.

teen percent of all births.³⁹ The figure is the same in Britain.⁴⁰ In the United States, between 2006 and 2010, twenty-four percent of first births were to women who were neither married nor cohabiting.⁴¹

While many in the same-sex attracted community have placed a very high value on the legal right to marry⁴²—whether or not they choose this status for themselves—the status of marriage has become more and more irrelevant to the intimate partnerships of heterosexual couples.⁴³

In part, this reflects the very trends which have led in many countries to the acceptance of same-sex marriage. Marriage is being redefined in secular Western societies through the prism of individualism,⁴⁴ just as it was in *Obergefell v. Hodges*.⁴⁵ The Judeo-Christian consensus has been that marriage has a religious and cultural meaning which transcends personal choice.⁴⁶ That is, it is not enough that two people choose to join in an intimate partnership. In traditional Christian teaching, they must of course be of different genders and be old enough to enter into matrimony; but they must also accept a partnership which is sexually exclusive and in principle for life.⁴⁷ That is, while in Judeo-Christian thought, a marriage is to be freely chosen, the rights and obligations to which marriage gives rise are externally derived from religious values.⁴⁸ Marriage, as understood in Christian thought, has offered only a standard form contract on a take-it-or-leave-it basis when it comes to the duration and exclusivity of the commitment.

Over time, the terms of that contract have progressively been weakened.⁴⁹ The exclusivity of the marital relationship used to be enforced by criminal prohibitions on adultery, which was also a ground for divorce.⁵⁰ Criminal offenses based on adultery have all but disappeared in liberal democracies,⁵¹ and in many countries, divorce is now a unilateral choice that may be exercised by a party to a marriage without attribution of

39. *Id.* at 133 tbl.2.12, 134 fig.2.13.

40. *Statistical Bulletin: Live Births in England and Wales by Characteristics of Mother*, OFF. FOR NAT'L STAT. (Oct. 15, 2013), <http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/livebirthsinenglandandwalesbycharacteristicsofmother1/2015-06-30>.

41. Gladys Martinez et al., *Fertility of Men and Women Aged 15–44 Years in the United States: National Survey of Family Growth, 2006–2010*, 51 NAT'L HEALTH STAT. REP. (Apr. 12, 2012), at 9 fig.5, available at <http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf>.

42. Suzanne B. Goldberg, *Why Marriage?*, in *MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES* 224, 224 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

43. See generally Anne BARLOW ET AL., *COHABITATION, MARRIAGE AND THE LAW: SOCIAL CHANGE AND LEGAL REFORM IN THE 21ST CENTURY* (2005); Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT'L J.L. POL'Y & FAM. 1 (2001).

44. Paul Amato, *Institutional, Companionate, and Individualistic Marriages*, in *MARRIAGE AT THE CROSSROADS*, *supra* note 45, at 107, 109–10.

45. See 135 S. Ct. 2584, 2597 (2015).

46. See Amato, *supra* note 44, at 108.

47. See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 13–17 (1981).

48. See *id.*

49. See *id.* at 28.

50. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1820 (1985).

51. In American law, see *id.* at 1818.

blame.⁵² Over time also, the idea that marriage is to be lasting has been seriously compromised by the ease with which a divorce may be obtained.⁵³ The law no longer provides support for the standard form contract with regards to duration and exclusivity.

What then is the future of marriage? In answering this question, it is important to differentiate between marriage as a religious and cultural tradition and marriage as a legal institution. There is no reason to believe that marriage, as a religious tradition, will not continue; for, at least among the People of the Book (adherents to Judaism, Christianity, and Islam), a public and religiously sanctioned marriage remains important.⁵⁴ To the extent that religion and culture are closely intertwined, many will marry also because it is a cultural expectation—even if they are not themselves deeply religious. People will still commit to one another, and will register their marriages if that is what the law requires.

What about secular forms of marriage which are not reflective of a particular religious or cultural tradition? The demise of marriage and the number of children born ex-nuptially across Europe and North America suggests that among those who do not have strong religious and cultural reasons to marry, legal marriage is already declining rapidly as a cultural norm.

III. RELIGIOUS HERITAGE AND THE NEED FOR A CELEBRANT

What distinguishes legal marriage from informal cohabitation in terms of the formation of the relationship is the need for a celebrant to pronounce the couple as married. A private exchange of vows, even before witnesses, indeed even before hundreds of witnesses at a large and expensive wedding, does not suffice to make the couple married unless there is a state-authorized celebrant in whose presence those vows are exchanged.

Why is this? And can, or should, such a requirement survive secularization? Is there any rational basis why weddings should involve the government at all, other than in terms of registration? Does the government have any legitimate interest in being present at the wedding ceremony? In practical terms, the government has no role at all to play in religious weddings, other than licensing marriages and imposing various requirements which are preliminary to the celebration. Is there any reason why there should be a celebrant for civil marriages?

As will be seen, the only explanation for having a celebrant is that it is a secular imitation of Christian tradition, especially as it developed from about the twelfth century onwards in Europe. This notion of marriage as a public event with a celebrant who represents God does not

52. See, e.g., *id.* at 1809.

53. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 190–91 (1989) [hereinafter, GLENDON, *TRANSFORMATION*].

54. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015).

have a pre-Christian history, nor does its plagiarized secular counterpart, a wedding conducted by a state official.

A. *Marriage in Roman Law*

In Roman law, marriage was based only on consent—the consent of the couple, and the consent also of a *paterfamilias*. As Susan Treggiari explains:

[t]he essential characteristic of Roman marriage was the consent of each partner. (If there was a *paterfamilias*, his consent at the initiation of the marriage was also required: for a daughter his consent might be assumed unless he evidently dissented.) Consent was signified at the beginning of a marriage. There was no prescribed form of words or action or written contract which had to be used at all weddings. Nor did any priest or public official act as president or witness of a ceremony.⁵⁵

No religious figure, lawyer, or public official was involved in divorce either, and no public record was kept of divorce.⁵⁶ Max Rheinstein has aptly described marriage, in Roman and indeed Greek thought, as “a secular affair, a contract, that, like any other, was concluded by the consent of the parties and that could be terminated even more easily than a commercial contract, namely, by the will of just one of the participants.”⁵⁷ That is not to say that marriage was entirely without ceremony. There might well be some ritual ceremony of crossing the threshold, and gifts might be presented.⁵⁸

Marriage was gradually transformed, through the influence of the Church, from a secular affair to a sacred institution; but its evolution from private agreement to religious sacrament was a very slow one.⁵⁹

B. *Canon-Law Rules on Marriage*

Through Christian influences, marriage eventually came to be seen as indissoluble, and the Church itself asserted jurisdiction in matrimonial matters.⁶⁰ In church law, as applied throughout those parts of Europe under the spiritual governance of Rome prior to the Reformation, marriage was seen as a matter of private contract.⁶¹ The basic rules were formulated by Pope Alexander III (1159–1181) who synthesized the canon law

55. Susan Treggiari, *Divorce Roman Style: How Easy and How Frequent Was It?*, in MARRIAGE, DIVORCE AND CHILDREN IN ANCIENT ROME 32–33 (Beryl Rawson ed., 1991); see also H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 113 (2nd ed. 1967).

56. LEAGE'S ROMAN PRIVATE LAW 112–114 (A.M. Pritchard ed., 3d ed. 1967); Treggiari, *supra* note 55, at 33.

57. See MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 10–17, 20–25 (1972).

58. GLENDON, TRANSFORMATION, *supra* note 53, at 17; see also JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 25 (2d ed. 2012).

59. GLENDON, TRANSFORMATION, *supra* note 53, at 23.

60. *Id.* at 23–31.

61. *Id.* at 23.

rules.⁶² Marriage could be entered into by consent through *verba de praesenti*, or words uttered by each of the parties evincing a present intent to marry; or *verba de futuro subsequente copula*, a promise to marry in the future which was consummated by sexual intercourse. The minimum age for capacity to marry was fourteen for boys and twelve for girls. From a theological perspective, capacity and consent were all that was required to make the marriage valid.⁶³

Canon law, however, drew a distinction between the requirements for the validity of a marriage and the evidence needed to prove the existence of a marriage.⁶⁴ That proof, through witnesses, was needed for a great variety of reasons: in the event of a dispute between the parties about whether there was a marriage; in the event of some uncertainty affecting, for example, the legitimacy of children, property rights or inheritance issues; and as the precondition for ecclesiastical courts to be able to punish adultery and other moral wrongs.⁶⁵

Pope Innocent III decreed in the thirteenth century that the exchange of consents be witnessed by two persons.⁶⁶ The Church encouraged a form of wedding that included a priestly blessing and nuptial mass.⁶⁷ Clandestine marriages were, at various times and places, strongly discouraged; indeed penalties might be applied.⁶⁸ A marriage which was not entered into in the presence of a priest might be regarded as illicit, and the parties would need to do penance.⁶⁹

C. *The Need for a Celebrant*

Eventually, the position came to be formally established that a marriage required formalities that went beyond private consent. In countries with a Roman Catholic heritage, this can be traced to the Decree Tametsi of the Council of Trent, which was promulgated in 1563.⁷⁰ The Church therein decreed that for a marriage to be valid there needed to be three witnesses, one of whom had to be the parish priest of one of the

62. Charles Donahue, Jr., *The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages*, J. FAM. HIST., Summer 1983, at 144, 144.

63. *Id.*

64. *Id.* at 145.

65. These courts were often called the “bawdy courts” because their jurisdiction was to police bastardy and sexual immorality. See ELEANOR FOX & MARTIN INGRAM, *Bridewell, Bawdy Courts and Bastardy in Early Seventeenth-Century London*, in COHABITATION AND NON-MARITAL BIRTHS IN ENGLAND AND WALES, 1600–2012, at 10, 22 (Rebecca Probert ed., 2014).

66. LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530–1987*, at 52 (1990).

67. Donahue, *supra* note 62, at 146.

68. In the twelfth century, for example, Pope Alexander III excommunicated those who contracted clandestine marriages. See John De Reeper, *The History and Application of Canon 1098*, 14 JURIST 148, 153–54 (1954).

69. R.H. Helmholz, *Recurrent Patterns of Family Law*, 8 HARV. J.L. & PUB. POL’Y 175, 178 (1985).

70. De Reeper, *supra* note 68, at 158.

parties; and there had to be an announcement about the prospective marriage beforehand, known as “publishing the banns of marriage.”⁷¹

The notion that a marriage could be contracted by *verba de praesenti* in private survived these reforms to some extent, but only as a form of contract to marry.⁷² If proven, the ecclesiastical courts would order the couple to solemnize their marriage in Church.⁷³

The requirement for a celebrant also came to be established in Protestant countries in the sixteenth century as well.⁷⁴ One of the major concerns that led to strict regulation of marriages was a concern about clandestine marriages, entered into without parental consent, and which provided a means for unscrupulous suitors to gain access to a family’s wealth as a consequence of property rights, which were consequent upon marriage.⁷⁵ Martin Luther, in particular, railed against clandestine marriages for this reason, and in some Protestant cities of what are now modern Germany and Switzerland, the presence of a minister was made mandatory, as was parental consent.⁷⁶

In England, reforms of this kind to deal with clandestine marriages entered into without parental consent were not enacted until Lord Hardwicke’s Act of 1753.⁷⁷ This law provided that a marriage was null and void unless it was preceded by banns for three consecutive Sundays in church, or there was an official license.⁷⁸ It had to be carried out publicly in a church or chapel by a regular Anglican clergyman and take place within prescribed daylight hours.⁷⁹ It was also essential for the validity of a marriage that it was recorded in a parish register and signed by the bride and groom, the officiating clergyman, and at least two witnesses.⁸⁰ Provision was made for Jews and Quakers to marry according to the rites of their own faiths, but it was only many years later that Catholics and non-conformists had an option to marry other than in the Church of England.⁸¹

71. *Id.* at 159. While the Decree Tametsi established the need for a priestly celebrant in countries where Roman Catholicism was the religion of the State, this rule was not universal. It was not applicable for Catholics in Protestant lands, where priests might not be available. For these believers, marriage remained a private and consensual union without the need for witnesses. *Id.* at 155–58.

72. Rebecca Probert, *Common-Law Marriage: Myths and Misunderstandings*, 20 *CHILD & FAM. L.Q.* 1, 7 (2008).

73. *Id.* at 4.

74. GLENDON, *TRANSFORMATION*, *supra* note 53, at 29.

75. *Id.*

76. *Id.*

77. *Id.* at 33.

78. STONE, *supra* note 66, at 123; *see also* STEPHEN CRETNEY, *FAMILY LAW IN THE TWENTIETH CENTURY: A HISTORY* 6 (2003).

79. STONE, *supra* note 66, at 123.

80. *Id.* at 124.

81. PETER BROMLEY, *FAMILY LAW* 34–52 (1987); CRETNEY, *supra* note 78, at 12.

D. *The Emergence of Civil Marriage*

In England, civil marriage was first introduced with the Marriage Act of 1836, which allowed for a civil form of marriage ceremony before a registrar.⁸² This offered an option for people who were not affiliated to one of the faiths to solemnize marriages.⁸³

In France, compulsory civil marriage had been introduced much earlier. As Lloyd Bonfield observed, long before the French Revolution, the monarchy had sought to exercise control over the process by which couples entered into marriage and consequently, on the eve of the French Revolution, “considerable secularization of the law concerning marriage formation had already been undertaken.”⁸⁴ The Revolution continued this process of wresting control of marriage from the Church. France made civil ceremonies mandatory by means of a revolutionary decree on September 20, 1792.⁸⁵ The law denied all legal effect to religious weddings.⁸⁶ The Napoleonic Code of 1804 included these provisions for compulsory civil ceremonies.⁸⁷ This model spread through much of Europe, in some countries as an optional alternative to religious ceremonies, and in others, such as Germany,⁸⁸ as the only form of legal marriage.⁸⁹ In France and Germany, the civil ceremony had to precede a religious ceremony.⁹⁰ Many countries of continental Europe retain that position.⁹¹

A society in which a secular wedding ceremony was compulsory needed to imbue it with meaning, and this the French did—by imitating the sacred. The leading French scholar, Jean Carbonnier, wrote of French marriage law that “[e]ven though secularized, marriage has a sort of religious gravity which is peculiar to it . . . a gravity based on the idea that man’s binding himself until death is an aspect of his intimation of mortality and his struggle against the ephemeral nature of existence.”⁹² Mary Ann Glendon has written of the French system that “marriage formation law in France seems to be part and parcel of the country’s civil religion.”⁹³ Secular law borrowed from religion the idea of a celebrant and a ceremony, and adopted the religious terms and conditions of what marriage meant—a union of a man and a woman till death do them part.

82. CRETNEY, *supra* note 78, at 11.

83. *Id.*

84. See Lloyd Bonfield, *European Family Law*, in *THE HISTORY OF THE EUROPEAN FAMILY: FAMILY LIFE IN THE LONG NINETEENTH CENTURY (1789–1913)* 109, at 128 (David I. Kertzer & Marzio Barbagli eds., 2002).

85. GLENDON, *TRANSFORMATION*, *supra* note 53, at 33.

86. *Id.* at 71.

87. *Id.* at 71–72.

88. *Ehegesetz* [Marriage Act], 20 Feb. 1946, BGB III at 404-1, § 11.

89. Bonfield, *supra* note 84, at 144.

90. GLENDON, *TRANSFORMATION*, *supra* note 53, at 71, 73.

91. See generally Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, in 4 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY* § 3-102 to -103 (Aleck Chloros et al. eds., 2007).

92. GLENDON, *TRANSFORMATION* *supra* note 53, at 72.

93. *Id.*

Thus, the option of civil marriage developed as an imitation of religious marriage. Just as ministers or priests solemnized religious marriages, and pronounced a couple to be husband and wife, the State, represented by a government official, fulfilled this function for those who sought a secular wedding. In either instance, the marriage required an authorized celebrant representing either divine or human authority.

E. Marriage in a Secular Society

It is questionable how much this idea of marriage has survived secularization or will survive into the future. Two major developments have occurred in recent years which might signal the demise of this notion of marriage. The first is the decline in the insistence that if a marriage is not solemnized in the presence of God's representative, it must instead be solemnized in the presence of the State's representative. The second is the blurring of the distinction between formal marriage and cohabitation.

These developments can be seen if one considers the options for relationship formation in five of the great cities of the world: Amsterdam, London, Edinburgh, Melbourne, and Washington, D.C.

IV. A TALE OF FIVE CITIES

Alex and Chris are in love. They are a young professional couple with options for employment in a number of the great cities in the world. At the commencement of that partnership, their options for family formation depend to a great extent on which city they choose to live in.

A. Amsterdam

If Alex and Chris live in Amsterdam, they have two choices for formalizing their relationship that have almost identical legal effects. Marriage, as in other countries of continental Europe, requires a civic ceremony conducted by an official of the Town Hall or equivalent.⁹⁴ Indeed, it is illegal to conduct a religious ceremony of marriage unless the civic ceremony has occurred first.⁹⁵

They don't actually have to marry at all in order to have a formalized legal partnership, however. The idea of a "registered partnership" was introduced in 1998 as an alternative for same-sex couples, to whom marriage was not available at that time.⁹⁶ When marriage was made available to same-sex couples in 2001, the registered partnership became

94. 1.5 BW § 1.54, art. 1.63 (2014) ("The marriage shall be contracted in public in the town hall before the Registrar of Civil Status in the presence of at least two and at the most four adult witnesses . . .").

95. *Id.* at art. 1.68 ("No religious ceremonies may take place before the parties have shown to the foreman of the religious service that the marriage has been contracted before a Registrar of Civil Status.").

96. Wendy M. Schrama, *Registered Partnership in the Netherlands*, 13 INT'L J.L. POL'Y & FAM. 315, 318 (1999).

more or less redundant.⁹⁷ It is, however, still a registered, legal form of cohabitation. There is practically no difference between a marriage and a registered partnership, and a registered partnership is open to both heterosexual and same-sex couples.⁹⁸ Effectively then, these represent alternative, but equivalent, forms of registering a domestic, intimate partnership with the State.

If Alex and Chris choose to live together informally, then their legal position will be very different.⁹⁹ Dutch law does not provide a property-sharing regime similar to marriage for couples in informal *de facto* relationships.¹⁰⁰ There is therefore a clear choice to be made between a registered relationship and an unregistered one.

B. London

If Alex and Chris live in London, they have a bewildering smorgasbord of options. They may choose to marry, but their choice of ceremony depends to a great extent on their religious affiliation, or lack thereof.¹⁰¹

Whether or not they are devoutly religious, they have a legal right to marry in any Church of England church, in which case notice of the marriage is given by the reading of “banns” in church.¹⁰² A marriage which takes place in accordance with the rituals of the Church of England will, without more, qualify as a marriage.¹⁰³ This is also the case if they go through a Jewish or Quaker wedding, as long as notice is given to the registry office.¹⁰⁴ If they choose to marry in any other religious tradition apart from that of the Church of England, or have a Jewish or Quaker wedding, then their marriage will be valid only if it is contracted in approved premises.¹⁰⁵

The validity of their marriage is subject also to compliance with certain additional formalities such as the presence of an “authorised person,” who is normally a religious leader within that faith tradition.¹⁰⁶ The marriage must be registered with the superintendent registrar.¹⁰⁷ This rather strange set of requirements, differing from one religious tradition to

97. Wendy M. Schrama, *Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity*, 2002 INT'L SURV. FAM. L. 277, 277–81 (2002).

98. *Id.*

99. Masha Antokolskaia, *Economic Consequences of Informal Heterosexual Cohabitation from a Comparative Perspective: Respect Parties' Autonomy or Protection of the Weaker Party?*, in LIBER AMICORUM WALTER PINTENS (A. Verbeke ed., 2012).

100. Wendy Schrama, *Marriage and Alternative Status Relationships in the Netherlands*, in ROUTLEDGE HANDBOOK OF FAMILY LAW AND POLICY, 14 (John Eekelaar & Rob Gorge eds., 2014).

101. *See generally*, LAW COMMISSION, GETTING MARRIED: A SCOPING PAPER 30, fig.7 (2015), available at http://www.lawcom.gov.uk/wp-content/uploads/2015/12/Getting_Married_scoping_paper.pdf.

102. Marriage Act 1949, 12, 13, & 14 Geo. 5, c. 76, § 5 (U.K.).

103. *Marriages and Civil Partnerships in the UK*, Gov.UK, <https://www.gov.uk/marriages-civil-partnerships> (last visited July 25, 2016).

104. *Id.*

105. Marriage Act 1994, c. 34 (U.K.).

106. *See supra* note 101.

107. *Id.*

another, reflects the gradual evolution of marriage law from the time of the Lord Hardwicke's Act of 1753 onwards.¹⁰⁸

If Alex and Chris do not want a religious ceremony, they can have a civil marriage. This can take place either in a registry office or on any other premises that have been approved for the purpose by the local authority.¹⁰⁹ The ceremony must be a secular one.¹¹⁰ A superintendent registrar, a registrar, and two witnesses must be present at the ceremony and a prescribed form of words must be used.¹¹¹

The echoes of Lord Hardwicke's Act remain in the notice requirements. Anyone who does not marry in accordance with the Church of England practices (in which case the banns of marriage must be read for three weeks prior to the wedding) is required to have given notice of the intended marriage at a registry office.¹¹² The law provides for various other civil preliminaries for ceremonies other than those conducted by the Church of England.¹¹³

Thus in England, Alex and Chris will have a choice between a Church of England ceremony as of right, a secular ceremony as of right, and various other kinds of religious ceremonies if the religious celebrant is willing to perform the ceremony.

It follows that in English law, God's approval is sufficient if the marriage takes place in a Church of England ceremony. God's approval is almost sufficient for Quakers and Jews also, but they need to give notice to the Superintendent Registrar first, who must give certificates.¹¹⁴ There are rather more requirements for the validity of a Catholic, Baptist, Methodist, Muslim, Hindu, or other faith-based wedding. The couple must not only have certificates but also marry in a building registered as a place of worship with an authorized person present, and subsequently register the marriage.¹¹⁵ Only when all these demands of Caesar have been satisfied will they be married in the eyes of the State as well as God.

The requirement that the building be registered as a place of worship causes particular difficulties in circumstances where the religious community fails to apply for registration of the building or is unaware of the need to do so.¹¹⁶ The consequence is that the marriage, while valid in accordance with the religious traditions of the couple, and valid also in the eyes of family and community, is not valid in the eyes of the State.¹¹⁷

108. *Id.*

109. *Marriages and Civil Partnerships in the UK*, GOV.UK, <https://www.gov.uk/marriages-civil-partnerships/weddings-and-civil-partnership-ceremonies> (last visited July 4, 2016).

110. Marriage Act, 1949, 12 & 13 Geo. 6, c. 76, §§ 46(1), 46(2).

111. *Id.* § 45(1).

112. *Id.* §§ 5, 27.

113. *Id.* §§ 53–57.

114. *Id.* § 26.

115. *Id.* § 27.

116. See John Eekelaar, *Marriage—A Modest Proposal*, 43 FAM. L. 82 (2013).

117. *Getting Married in England and Wales*, GEN. REG. OFF., https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/347609/357c_V3.pdf (last visited July 4, 2016).

On the other hand, the State's approval is sufficient for a civil ceremony, with the State represented by an official registrar. God is not permitted to take part. In short, English law provides the options of God without a license, God with a license, God with a license and in approved premises, and a license and registration without God. No explanation can be given for this except history.

If Alex and Chris are a same-sex couple, then their options are more limited. They cannot be married in the Church of England, for the compromise between secularism and faith concerning "gay marriage" was to ensure that the Church of England could not be required, contrary to its official doctrinal position, to conduct marriage ceremonies for same-sex couples.¹¹⁸ Other faith communities were given the option to conduct same-sex weddings in a registered building if the appropriate authorities apply for registration to do so.¹¹⁹ An option that remains open to Alex and Chris, as a same-sex couple, is to enter into a civil partnership, which will have all the same consequences as marriage.¹²⁰ Unlike in the Netherlands, heterosexual couples do not have this option.¹²¹

It is reasonable to ask why there are such differences in the law governing different faith communities. Why does the State need to insist that the building be registered for certain kinds of marriages? And why is it that celebrants must either be religious leaders or state-employed officials? The position is rather different just north of the border in Scotland.¹²²

C. *Edinburgh*

If Alex and Chris live in Edinburgh, then they may choose a religious marriage or a civil marriage.¹²³ The concept of religion has been extended to other belief systems that are not religious, however. In particular, the practice has emerged since about 2005 for leaders of a humanist society also to be allowed to solemnize marriages.¹²⁴ As a consequence, whereas the legislation itself refers to "religious marriages" as opposed to civil ones, the language is now used in official documents of "religious and belief marriages."¹²⁵ The Humanist celebrations are now reportedly

118. Caroline Wyatt, *Will the Church Ever Accept Same-Sex Marriage?*, BBC NEWS (June 15, 2015), <http://www.bbc.com/news/uk-33109170>.

119. Marriage (Same Sex Couples) Act, 2013, c. 30, § 43A (U.K.).

120. See Civil Partnership Act, 2004, c. 33 (U.K.).

121. *Id.*

122. Scotland has long had a different tradition of family law to England, reflected in different marriage laws. D.W.R. Brand, *The Marriage Law of Scotland*, 25 QUIS CUSTODIET 178, 178-79 (1969).

123. Marriage (Scotland) Act, 1977, c. 15 (U.K.).

124. This is by means of a temporary authorization. See *id.* § 12. The Humanist Society Scotland says of itself that it includes "atheists and agnostics who make sense of the world using reason, experience and shared human values." They seek to make the best of the one life they have by creating meaning and purpose for themselves, individually and together.

125. *Getting Married*, ADVICE FOR SCOTLAND, <https://www.citizensadvice.org.uk/scotland/relationships/living-together-marriage-and-civil-partnership-s/getting-married-s/> (last visited July 4, 2016).

the third largest category of wedding after the Church of Scotland and civil marriages.¹²⁶ In 2010, there were more humanist weddings than Catholic marriage ceremonies.¹²⁷

D. Melbourne

If Alex and Chris were to begin their family life in Melbourne, they have a range of options for formalizing their relationship as well. They may choose a religious wedding. They may get married in a registry office, or they may purchase the services of a private marriage celebrant.¹²⁸ By authorizing marriage celebrants, Australia has partially privatized the solemnization of marriages.¹²⁹ It need not be a state official who pronounces the couple duly married. It is sufficient that it is someone who has been authorized by the government to take weddings.¹³⁰ For secular celebrants, it is a professional occupation, or a business.

If Alex and Chris do not want to marry (and if they are a same-sex couple that is not currently an option), then there may be other options. In Melbourne (Victoria), as in many other parts of the country, for example Queensland,¹³¹ they can enter into a “registered relationship.”¹³² A registered relationship has the same effects as marriage for the purposes of the law of that jurisdiction.¹³³ In federal law, the relationship will be treated as a “*de facto* relationship.”

While these are all options for Alex and Chris to formalize their relationship, they actually have no need to do so, for they will be treated as married just by living together—at least for some period of time.¹³⁴ There is now almost no difference at all between being married and living in a “*de facto* relationship” in any area of state or federal law.¹³⁵ The trajectory of law reform at both state and federal levels over twenty years has been to insert the words “or *de facto*” wherever the word “marriage” or “spouse” appears in legislation.¹³⁶ Initially this was to address the issues for heterosexual couples who do not marry, and later the term “*de facto*” was extended to include same-sex couples.¹³⁷

126. John Eekelaar, *Marriage and Religion* 9 (May 2014) (paper given at ESRC seminar).

127. Mike Wade, *More Humanist Weddings Will Outstrip the Kirk*, *TIMES* (Apr. 23, 2015, 12:01AM), <http://www.thetimes.co.uk/tto/news/uk/scotland/article4419931.ece>.

128. *Marriage Act 1961* (Cth) (Austl.).

129. *Id.*

130. *Id.*

131. *Registered Relationships Act 2011* (Qld).

132. *Relationships Act 2008* (Vic).

133. For example, the Civil Unions Act 2012 provides: “A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage.” *Civil Unions Act 2012* (ACT) s 2.1.

134. Regina Graycar, *Law Reform: Concept of Family Under Review*, 39 *LAW SOC'Y J.* 64 (2001).

135. PATRICK PARKINSON, *AUSTRALIAN FAMILY LAW IN CONTEXT*, ch.19 (6th ed, 2015).

136. Danny Sandor, *Legislating in Australia for Love Outside of Marriage* 1 (U. W. CAPE FAM. L. CONF., 2002), available at http://www.familycourt.gov.au/wps/wcm/connect/f2fdab99-89fd-461c-81b6-1bd1ee071b4c/sandor.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=f2fdab99-89fd-461c-81b6-1bd1ee071b4c.

137. *Id.*

There are some legal consequences of living in a *de facto* relationship which require a minimum period, for example two years, or having a child.¹³⁸ Once these thresholds are crossed, however, the *de facto* relationship has exactly the same effects as marriage. In New Zealand, there has also been a substantial assimilation of the legal consequences of marriage and informal cohabitation.¹³⁹

In Australia, then, whether Alex and Chris choose to marry, have a registered relationship, or live together as a couple without formalizing or registering their relationship, the effects are much the same.

E. Washington, D.C.

If Alex and Chris live in Washington, D.C., they can get anyone to solemnize their marriage. Indeed, they may even solemnize it themselves.¹⁴⁰ The Marriage Officiant Amendment Act of 2013 amended Chapter 4 of Title 46 of the Code of the District of Columbia to provide that the following people may solemnize a marriage as long as they are at least eighteen years old: a judge or retired judge; the Clerk of the Court or such deputy clerks as are approved by the Chief Judge of the Court; a minister, priest, rabbi, or authorized person of any religious denomination or society; a civil celebrant (defined as a person of a secular or non-religious organization who performs marriage ceremonies); a temporary officiant who is authorized by the Clerk of the Court to solemnize a particular wedding; members of the City Council; the Mayor; or the parties to the marriage.¹⁴¹

A religious organization is widely defined. The term “religious” is defined as including or pertaining to a belief in a theological doctrine, a belief in and worship of a divine ruling power, a recognition of a supernatural power controlling man’s destiny, or a devotion to some principle, strict fidelity or faithfulness, conscientiousness, pious affection, or attachment.¹⁴² This goes far beyond the Scottish embrace of humanism as a religion.¹⁴³ It is broad enough to include an organization or society which holds a belief in, or commitment to, almost anything.

The provision allowing a temporary officiant to solemnize a marriage with authorization from the court gives a basis upon which a family friend could be authorized to solemnize the wedding.¹⁴⁴

The idea that parties can marry themselves is not unique to the country’s capital. What are now called “self-uniting marriages” have their religious origins in the Quaker tradition, and have long been possi-

138. *Family Law Act 1975* (Cth) s 90SB (Austl.).

139. Bill Atkin, *The Legal World of Unmarried Couples: Reflections on “De Facto Relationships” in Recent New Zealand Legislation*, 39 VICT. U. WELLINGTON L. REV. 793, 795 (2008).

140. D.C. CODE § 46-406 (2013).

141. *Id.*

142. *Id.*

143. See *supra* note 125 and accompanying text.

144. D.C. CODE § 46-406.

ble in Pennsylvania.¹⁴⁵ Couples may marry themselves in Colorado as well.¹⁴⁶

V. WHAT THEN IS MARRIAGE?

This brief survey of just five jurisdictions shows how confused the law of marriage is becoming in secularized societies. Civil marriage was only ever a pale imitation of the ritual and ceremony of the Church. Most people wanted to be married in the eyes of God, but the State provided an alternative form of ceremony for those of a minority faith or none at all, and an alternative source of authority to the divine. The State had an official celebrant because the Church had an official celebrant—the priest or minister. Civil marriages gained a derivative sense of meaning and solemnity from the religious meaning of marriage as a covenant under God, and a sacrament.

There is no compelling justification—maybe no justification at all—for insisting on an official celebrant in a secular society other than by way of imitation of the religious nature of marriage. And so it has been that in various different ways, the modern law of marriage in various countries has drifted away from its former insistence that to be valid, a marriage had to be solemnized either by Church or State.

Scottish law provides one illustration. The concept of a religious wedding in the law has now been extended to irreligious weddings by a practice of authorizing members of the Humanist Society to conduct weddings under the religious wedding provisions. The humanist celebrant stands in the shoes of neither God nor Government. Is there something about marriage that it has to be solemnized either by a state official or by someone with a worldview on the meaning of life and the origins of human existence?

If the humanist or atheist has no special authority for pronouncing a couple to be married, there may be some logic in the government just licensing private individuals to be marriage celebrants, as in Australia.¹⁴⁷ To be sure, they are authorized by the Government, but they do not represent the Government any more than the humanists in Scotland do. They are essentially running a private business under license from the State.

And so there is a somewhat charming *reductio ad absurdum* logic in the law of Washington, D.C., which provides that anyone can solemnize a particular marriage with authorization from the clerk of the court, or indeed that the parties can have their own DIY wedding and declare themselves to be married. Why not? In a secular worldview, there is neither need for celebrant nor ceremony. As the High Court of Australia perceptively observed, there is no intrinsic reason why a wedding

145. 23 PA. CODE § 1502 (2014).

146. COLO. REV. STAT. § 14-2-109 (2013).

147. See *supra* note 128 and accompanying text.

shouldn't be very simple—just the exchange of promises before witnesses.¹⁴⁸

Yet if this is so, where is the boundary line between marriage and non-marriage? Is a registered partnership in the Netherlands really just a marriage by a different name? What about a registered relationship in Victoria, Australia? Is the intent involved in registering one's partnership with a government office materially different to the expression of intent that is necessary in Washington, D.C. for someone to be married? In reality, all that Washington, D.C. requires is that the parties obtain a license before making their private commitment to one another.¹⁴⁹

The law in Australia and certain other countries, including jurisdictions that recognize "common law marriage," raises a question whether people should be deemed to be married by the fact of cohabitation in an intimate domestic partnership. As Stephanie Coontz has observed, the wall separating marriage from non-marriage is breaking down.¹⁵⁰ If the consequences of non-marriage are the same as for marriage, then what is marriage in civil law but a form of registration?

And if marriage is simply a form of registration which is sufficient (but not, in Australia, even necessary) to confer upon a couple the rights, privileges, and obligations of marriage, should divorce be anything more than a form of deregistration?¹⁵¹ In practice, that is all it is in countries with unilateral no-fault divorce statutes, such as Sweden and Australia. The divorce still goes through the court, but in Australia, for example, divorces are pronounced by registrars (equivalent to clerks of the court) in a quasi-administrative process.¹⁵² Issues concerning property division, maintenance, and parenting arrangements for children are dealt with separately from the divorce itself, with the consequence that a divorce is of no significance other than as a right to remarry.¹⁵³ In certain other countries, many divorces are dealt with by administrative process also.¹⁵⁴

In a secular society, which does not hold to the belief that the State has any role in keeping people together, why wouldn't divorce become simply an administrative act of deregistration of a marriage?¹⁵⁵

148. *Commonwealth v. Australian Capital Territory* (2013) 250 CLR 441, 462 (Austral.).

149. D.C. CODE § 46-406 (2013).

150. Stephanie Coontz, *The World Historical Transformation of Marriage*, 66 J. MARRIAGE & FAM. 974, 978 (2004).

151. For discussion, see e.g., Richard Ingleby, *Regulating the Termination of Marital Status: Is It Worth the Effort?*, 17 MELB. U. L. REV. 671 (1990).

152. STEPHANIE CHARLESWORTH ET AL., *DISRUPTED FAMILIES: THE LAW* 91 (2000).

153. GLENDON, *TRANSFORMATION* *supra* note 53.

154. KATHARINA BOELE-WOELKI ET AL., *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES* 20–21 (2004).

155. Britain's leading family law judge, Sir James Munby, has asked: "[M]ay the time not come when we should at least consider whether the process of divorce still needs to be subject to judicial supervision?" Sir James Munby, President of the Family Div., The 2014 Michael Farmer Memorial Lecture at the 2014 Legal Wales Conference at Bangor University 11 (Oct. 10, 2014), *available at* <https://www.judiciary.gov.uk/wp-content/uploads/2014/10/munby-speech-bangor-10102014.pdf>.

VI. CONCLUSION

Can marriage survive secularization? Yes, as the echo of a distant voice reverberates around a canyon for sometime after the speaker has ceased to emit sound. Yet marriage has little meaning except insofar as it is rooted in history, faith, and culture. Marriage was not first of all a legal institution in any society of the world; it was grounded in culture, custom, and faith. To the extent that civil marriage derives its identity, meaning, and solemnity from being an echo of the sacred, it will surely not long survive secularization. It may be that it will develop its own identity within a secular culture. Sociologist Andrew Cherlin has observed that as marriage has become deinstitutionalized in American life, it has become more symbolically important, having “evolved from a marker of conformity to a marker of prestige.”¹⁵⁶ It is perhaps evolving to become a capstone of a successful intimate domestic relationship, not the foundation stone.¹⁵⁷ This may explain the comparative strength of marriage among the most educated members of American society, whose identity is partly defined by the world of work and who, to some extent at least, live out their private lives in public.

This may perhaps put a different perspective on the intense debates about same-sex marriage. For advocates of same-sex marriage, the goal has been to obtain access to a status which carries prestige.¹⁵⁸ Marriage is the ultimate form of acceptance of the legitimacy and value of same-sex partnerships.¹⁵⁹ Opponents of same-sex marriage have sought to preserve the historic connection between the religious meaning of marriage and its secular meaning.¹⁶⁰ In the United States, as in many other countries, the former arguments have prevailed, but the opponents of same-sex marriage may prove to be right—that it is another stepping stone towards the eventual decline and fall of the idea of marriage as a civil institution.

At the heart of the problem is not that same-sex couples can marry in many countries. The bigger problem is that the secular State is utterly unable to provide any convincing narrative about what marriage *is*. Yes, marriage is a commitment between two people made before family and friends; but that can happen without the regulatory infrastructure of marriage law. If once marriage was an enforceable contract or covenant, it is no longer in countries that allow for unilateral no-fault divorce.

Like an ancient civilization that loses its battle with the encroaching jungle, we are slowly returning as a society to a pre-Christian state in which the ruins of a stable and healthy marriage culture, deeply embed-

156. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 858 (2004).

157. Pamela Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. MARRIAGE & FAM. 966 (2004).

158. *Id.* at 968.

159. See, e.g., William Eskridge, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

160. Rod Benson et al., *Ethical Arguments Against Same-Sex Marriage Laws*, ABC RELIGION & ETHICS (Aug. 4, 2011), <http://www.abc.net.au/religion/articles/2011/05/20/3222067.htm>.

ded in the soil of the Judeo-Christian tradition, are covered over with the dense leaves and tangled branches of secular confusion about what marriage really means.

Civil marriage, divorced from its religious and cultural heritage, and no longer involving a commitment to a lifelong union, may end up being little more than the name that is given to an intimate domestic partnership which is registered with the State.

Will this mean the end of the wedding industry? Not at all. For the public commitment of one person to one another, and the celebration of love, will long be popular. For some time to come, no doubt, marriage will continue to be a marker of prestige. Nor will secularization mean the complete end of marriage as we now understand it, for where it has deep religious and cultural roots, marriage will continue to matter. It will be only one of the accepted forms of intimate dyadic partnership, however, with non-marital cohabitation and “living apart together” relationships also becoming established social institutions.¹⁶¹

What may not long survive secularization is non-religious marriage in its traditional form, with the State providing an official celebrant and the law regulating the form of the exchange of promises. Marriage without a religious or cultural underpinning has no clear meaning or identity. The echo of the sacred is fading now, and sooner or later, the canyon will lapse back into silence.

161. Jan Trost, *The Social Institution of Marriage*, 41 J. COMP. FAM. STUD. 507 (2010).